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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION
17

18 Ronald A. Katz Technology Licensing,
19 L.P.,

20 Plaintiff,

21 v.

22 Aetna Inc., et al.,

23 Defendant.

24 CV 07-2213 RGK (FFMx)
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26
27
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Case No. 07-ML-1816-B RGK
(FFMx)

**OPPOSITION TO AETNA
DEFENDANTS' OBJECTIONS TO THE
DISCOVERY SPECIAL MASTER'S
ORDER NO. 56 RE KATZ'S MOTION
TO COMPEL FURTHER RESPONSES
TO DISCOVERY REQUESTS**

DISCOVERY MATTER

Magistrate Judge Frederick F.
Mumm

1 **I. Introduction**

2 Plaintiff Ronald A. Katz Technology Licensing, L.P. (“Katz”) hereby
3 respectfully opposes the Objections of Defendants Aetna Inc. and Aetna Rx Home
4 Delivery LLC (collectively, “Aetna”) to Discovery Special Master’s Order No. 56.
5 The relief granted in Special Master Quinn’s Order No. 56 was fully justified and
6 Aetna’s Objections to the Order are frivolous and an unnecessary waste of the
7 Court’s time.

8 **II. Aetna’s Objections Are Without Merit**

9 Aetna’s objections are frivolous. After briefing and argument, Special
10 Master Quinn properly concluded that Aetna had not only failed to discharge basic
11 discovery obligations, but was continuing in a pattern of discovery misconduct that
12 was unnecessarily increasing motion practice. Tacitly conceding the propriety of
13 the Order, Aetna subsequently supplemented its discovery and, indeed did so before
14 filing its Objections to DSMO No. 56 (and two days later than the deadline set by
15 Special Master Quinn¹).

16 Aetna, without citing any legal authority, now requests the remarkable
17 remedy that it be permitted to belatedly withdraw its supplemental written

18
19 ¹ Aetna was ordered by Special Master Quinn to provide supplemental responses no
20 later than May 19, 2008. *See* D.I. 233 at 4. On May 19, without consulting with
21 Katz first, Aetna sent an ex parte request via e-mail to Special Master Quinn
22 requesting an extension of time to provide supplemental responses and to pay the
23 allowed attorneys’ fees. *See* Ex. A at 2. Special Master Quinn granted Aetna’s
24 request with respect to the allowed fees, but denied Aetna’s request regarding the
25 supplemental responses. *Id.* Aetna did not serve the responses as ordered on May
26 19. On May 20, Katz sent a letter to Aetna inquiring about the court ordered
27 responses. *See* Ex. A at 1. Aetna’s counsel then informed Katz that it was tardy in
28 providing the responses due to a “docketing error” and Katz’s counsel agreed to
allow the responses to be served on May 21. *See* Decl. of Phillip E. Morton at ¶ 2.
Aetna’s counsel did not reveal that it was objecting to DSMO No. 56 and expressed
no reservations about providing the supplemental responses before it finally did so
on May 21, one day before filing its objections to DSMO No. 56. *See* Decl. of
Phillip E. Morton at ¶ 2 and Ex. E.

1 discovery responses, responses that at least provided Katz with some additional
2 discovery beyond what was provided in Aetna's original responses that were found
3 by the Special Master to be "beyond inadequate." D.I. 233 at 4. Further, most of
4 the discovery defects that Aetna raises in current papers are objections that Aetna
5 did not even include in its responses to Katz's original discovery and thus are
6 waived. If Aetna considered the discovery requests truly objectionable, Aetna
7 would have timely interposed its objections to the original discovery and, at a
8 minimum, would have filed its Objections to DSMO No. 56 before serving the
9 supplemental discovery ordered by Special Master Quinn. Aetna's inconsistent and
10 belated Objections appear to be nothing more than Aetna's latest effort to delay and
11 drive up Katz's costs for this litigation.

12 **III. Special Master Quinn's Sanction Order Was Based on Aetna's**
13 **On-Going Discovery Misconduct and Was Fully Warranted**

14 Aetna complains that Special Master Quinn erred by awarding sanctions for
15 Aetna's discovery misconduct. Aetna's primary argument is that it was allegedly
16 justified in opposing Katz's Requests for Admission (RFAs) and Interrogatories.
17 Wholly aside from the fact that Aetna's objections were not proper, Aetna misreads
18 the Special Master's Order. While Special Master Quinn did sanction² Aetna for its
19 misconduct as it relates to the RFAs and Interrogatory responses at issue in its
20 Objections, Special Master Quinn made clear that he was also sanctioning Aetna for
21 its conduct in scheduling 30(b)(6) depositions and for its on-going pattern and
22 practice of discovery misconduct throughout this litigation. D.I. 233 at 3-4. Aetna
23 fails to explain in its Objections that DSMO No. 56 constituted the second time³
24

25 ² Special Master Quinn ordered Aetna to pay 100% of the Special Master's costs to
26 hear and decide the motion and, as an additional sanction for discovery misconduct,
27 he ordered Aetna to pay Katz's reasonable costs to prepare and argue the motion.
28 D.I. 233 at 4. Katz submitted costs of \$6614 to prepare and argue the motion, of
which Special Master Quinn allowed \$3800. *See* Ex. A at 3.

³ To the best of Katz's knowledge, Aetna is the only party to be sanctioned twice by

1 that Special Master Quinn has sanctioned Aetna for discovery misconduct.
2 Previously, in DSMO No. 35, as a sanction for discovery misconduct, Aetna was
3 ordered to pay 100% of Special Master Quinn's costs in deciding Katz's Motion to
4 Compel because "Aetna's . . . responses were non-complaint with the DCMO and
5 the Federal Rules" and "Aetna failed to cooperate reasonably with Katz in meet and
6 confer sessions both to provide the requested discovery in a reasonable form and to
7 avoid the need for [the] motion." D.I. 169 at 3. In sanctioning Aetna a second time
8 in Order No. 56, Special Master Quinn specifically found that "Aetna's discovery
9 responses and lack of diligence in meet-and-confer efforts had been improper
10 Neither Aetna nor its counsel appear to have gotten the message from Discovery
11 Order No. 35." D.I. 233 at 3. Special Master Quinn explained that Aetna's actions
12 appeared to be "designed to hide the ball" and "to increase expense and delay."
13 D.I. 233 at 4.

14 In an attempt to muddy the waters and evade Special Master Quinn's limited
15 sanction order (sanctions that are a fraction of the costs that will be expended
16 opposing these Objections), Aetna chooses to engage in ad hominem attacks on
17 Katz's counsel and what Aetna purports to be deficiencies in the meet and confer
18 process. Aetna's complaints appear to be largely centered on its contention that, at
19 the meet and confer, Katz would not somehow "define" an Interrogatory that was
20 (and as Special Master Quinn correctly found) clearly and plainly written and
21 which Aetna could easily answer with a narrative response.⁴ Decl. of Phillip E.

22
23 Special Master Quinn for discovery misconduct.

24 ⁴ Aetna complains in footnote 1 of its Objections that no transcript of the hearing
25 with Special Master Quinn is available. While Katz regrets that there was a
26 misunderstanding about the scheduling of the court reporter, Aetna alleges no
27 prejudice resulting from the lack of a transcript and neither party nor the Special
28 Master raised any concerns or objections during the hearing. Therefore, the
absence of the transcript constitutes harmless error. Katz further notes for the
record that Katz did not "violate" the Court's August 28, 2007 Order because the
Order does not assign the burden to any specific party to ensure that a qualified

1 Morton, at ¶ 3; D.I. 233 at 3. The Court should reject Aetna's argument. Katz met
2 and conferred in good faith with Aetna for approximately half an hour in an attempt
3 to resolve the differences between the parties on these issues and to understand
4 Aetna's purported confusion over a basic interrogatory. Decl. of Phillip E. Morton,
5 at ¶ 3. Katz deemed the meet and confer concluded only after it became apparent
6 that there was a irresolvable difference regarding whether terms used in the
7 Interrogatory, such as "benefit," were clear enough to enable Aetna to formulate a
8 response. *Id.*

9 **IV. Special Master Quinn's Order Compelling Written Discovery Was**
10 **Proper**

11 **A. Aetna Waived Its Objections By Not Timely Asserting Them In Its**
12 **Original Responses**

13 Incredibly, Aetna asks this Court to allow it to withdraw *all* of its
14 supplemental responses to Katz's Requests for Admission, yet Aetna raises specific
15 concerns about only four of the sixteen Requests for Admission in its Objections.
16 For these four, Aetna argues that they improperly seek legal conclusions. Tellingly,
17 however, Aetna only raised this objection to a single RFA when serving its initial
18 deficient answers to Katz's RFAs. *See, e.g.,* Ex. B at 9 (Aetna only objected RFA
19 No. 16 as "improperly seeking an admission of a legal conclusion as to patent claim
20 interpretation"). Only after being challenged for their deficient answers does Aetna
21 now try to object to RFA Nos. 1, 12 and 13 as purportedly seeking legal
22 conclusions.

23 Aetna's failure to pose timely objections to any RFA other than RFA No. 16
24 constitutes a waiver of its objection. *See, e.g., Wagner v. St. Paul Fire & Marine*
25 *Ins. Co.*, 238 F.R.D. 418, 423 (N.D. W. Va. 2006) (finding that although Rule 36
26 does not contain a waiver provision, "there are strong indications such a
27

28 court reporter is present. *See* MDL D.I. 180 at 3.

1 requirement should be implied"); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*,
2 Civ. A. No. 88-9752, 1992 WL 394425, *4 (E.D. Pa. Dec. 28, 1992) (objection to
3 request for admission waived when answering party failed to assert objection in
4 initial responses). Because Aetna did not timely assert an objection that the
5 Requests for Admission (other than RFA No. 16) requested legal conclusions,
6 Aetna has waived this objection.

7 Notwithstanding Aetna's waived objections, Aetna grossly distorts the RFAs
8 in an attempt to transform them into requests to admit legal conclusions. As the
9 Special Master recognized, "every [request for admission] deals entirely with real-
10 world facts and evidence [n]one asks for anything remotely approaching a
11 legal conclusion." D.I. 233 at 3. For example, RFA No. 16 asks Aetna to admit
12 "that the Accused Systems include call distributors at multiple geographic
13 locations." *See* Ex. B at 9. Contrary to Aetna's claims, RFA No. 16 is not asking
14 Aetna to "admit legal conclusions regarding the meaning of [claim] terms," it is
15 asking Aetna to admit whether *Aetna's accused systems* have certain commonly
16 understood components in a particular configuration. The fact that such a factual
17 inquiry may bear on Aetna's infringement of an asserted claim is not an appropriate
18 reason to refuse to answer a request for admission. Requests for admission are
19 clearly permitted "to seek the truth of any matters within the scope of Rule 26(b)(1)
20 relating to . . . facts, the application of law to fact, or opinions about either." Fed.
21 R. Civ. P. 36(a)(1). Here, Katz's requests for admission were inquiring into real
22 world facts about Aetna's accused systems and Katz had to phrase them with real
23 world terminology. The fact that some words in the RFAs are similar to words in
24 the claims is of no moment because the RFAs are not admissions of infringement,
25 but admissions of fact.

26 Aetna's argument that many of the claim terms allegedly at issue in the RFAs
27 are "disputed, in some instances, hotly" is equally frivolous. *See* Aetna's
28 Objections at 3-5. In response to an earlier served interrogatory regarding Aetna's

1 non-infringement claims, Aetna never revealed that it disputes infringement of any
2 of the claim limitations that Aetna now claims are “hotly” disputed.⁵ Again,
3 Aetna’s objection here appears to be simply another newly invented objection that
4 it failed to timely assert in its original responses.

5 **B. Aetna Waived Its Objection that Interrogatory 25 Constitutes**
6 **Multiple Subparts**

7 Special Master Quinn did not err by ordering Aetna to answer Interrogatory
8 No. 25 to explain its basis for any denial of any Request for Admission. As Special
9 Master Quinn stated, such an interrogatory is “common and wholly proper,” and
10 was necessary to make Aetna’s responses to the RFAs meaningful. DSMO No. 56
11 at 2. It is particularly appropriate in the circumstances here, where Aetna’s
12 responses to Katz’s requests for admission were evasive and not well grounded. As
13 Special Master Quinn discussed in his Order, “[i]nstead of admitting or denying the
14 requests as phrased, Aetna reworded the fairly precise requests into much vaguer
15 statements that it then admitted – and otherwise denied the request.”⁶ DSMO No.

16 ⁵ See Ex. C at 9-10 (for ‘309 claim 51 (dependent on claim 46) Aetna does not
17 dispute infringement of “interface structure” or “voice generator structure . . . to
18 provide vocal operating instructions”), 10 (for ‘285 claim 19 (independent claim of
19 dependent claim 71) Aetna does not dispute infringement of DNIS “automatically
20 provided”), 12-13 (for ‘863 claim 31 Aetna does not dispute infringement of
21 “interface structure” or called number identification signals (DNIS) “automatically
22 provided”; for ‘863 claim 43 Aetna does not dispute infringement of “call
23 distributors at multiple geographic locations”), and 15 (for ‘120 claim 57, Aetna
24 does not dispute infringement of dialed-number identification signals “provided
25 automatically”).

26 ⁶ One example is Request for Admission No. 10: “Admit that it is not Your
27 practice, policy or procedure to issue the same prescription number to more than
28 one person for use with each applicable Accused System.” Aetna’s original
response was: “Subject to the General Objections . . . the Aetna Defendants admit
that it is their practice to abide by applicable state and federal statutes and
regulatory requirements for the dispensing of drugs. Otherwise, the Aetna
Defendants deny this request.” Ex. B at 7. Aetna provided identical, non-
substantive responses to RFA Nos. 7-9, 11. See *id.* at 6-8.

1 56 at 2.

2 In any event, Aetna waived its objection that Interrogatory 25 constitutes
3 multiple subparts because, once again, Aetna did not timely assert the objection in
4 its original responses. Fed. R. Civ. P. 33(b)(4) (“The grounds for objecting to an
5 interrogatory must be stated with specificity. Any ground not stated in a timely
6 objection is waived unless the court, for good cause, excuses the failure.”); *Ramirez*
7 *v. County of Los Angeles*, 231 F.R.D. 407, 409-410 (C.D. Cal. 2005) (“the court
8 will not consider any objections that were not asserted in the responding party’s
9 original discovery responses”); *IMA North America, Inc. v. Marlyn Nutraceuticals,*
10 *Inc.*, No. CV-06-0344-PHX-LOA, 2007 WL 2391099, *3 (D. Ariz. Aug. 20, 2007)
11 (“Courts have specifically held that if there is a violation of the 25 interrogatory
12 limit in Rule 33(a), ‘the responding party must object (to the Court) to the number
13 of interrogatories before responding in order to rely on this rule.’”). Here, Aetna
14 made no objection that Interrogatory 25 or any of the other interrogatories in Katz’s
15 Third Set of Interrogatories was compound or constituted multiple subparts.⁷
16 Therefore, since Aetna did not clearly and specifically object to Interrogatory No.
17 25 as compound or constituting multiple subparts as part of its original responses to
18 the Third Set of Interrogatories, Aetna’s objection is waived.

19 **C. Aetna’s Objections to Katz’s Interrogatory 24 are Unnecessary**
20 **and Unfounded**

21 Since Aetna has supplied a supplemental answer to Interrogatory No. 24 that
22 provides information that was not included in the documents cited pursuant to Fed.

23 ⁷ Indeed, the only remotely related objection was Aetna’s General Objection No. 5,
24 which states: “The Aetna Defendants object to the [Third Set of] Interrogatories
25 because, together with the multiple subparts of RAKTL’s First Set of
26 Interrogatories, they comprise more than the twenty-five interrogatories per
27 Defendant permitted under paragraph VIII.B of the DCMO.” See Ex. D at 4. This
28 objection was simply an extension of its objection that certain interrogatories in
Katz’s First Set of Interrogatories included multiple subparts (which are not at issue
here).

1 R. Civ. P. 33(d) in Aetna's original response, Katz is uncertain what Aetna hopes to
2 gain from its Objections here. Outside of opposing the sanctions order, Aetna
3 makes no complaint in its Objections that Special Master Quinn's Order requiring a
4 supplemental response to Interrogatory No. 24 was improper or erroneous.

5 In any event, the language of Interrogatory 24 is clear and Aetna's 33(d)
6 designation to documents provided Katz virtually no insight into the day to day
7 relationship between Aetna and Pharmacare regarding the Aetna Rx Home Delivery
8 system. The contracts cited to by Aetna (Exs. B-E of Aetna's Objections) provide
9 incomplete information about Aetna's management or control over the Aetna Rx
10 Home Delivery accused system, making a narrative response necessary for Aetna to
11 actually answer the interrogatory. In its Objections, Aetna cites to sections of the
12 contracts labeled "Change Requests," but even a cursory review of the sections
13 reveals that they are primarily directed to changes in procedures for physically
14 filling prescription drugs, not for making changes to the Aetna Rx Home Delivery
15 accused system. See Ex. B to Aetna's Objections at AETNAP117461-462; Ex. C to
16 Aetna's Objections at AETNAP117478. Aetna's narrative response, which Aetna
17 already provided in accordance with DSMO No. 56, was thus necessary for Aetna
18 to respond to Interrogatory No. 24 and allowing Aetna to belatedly withdraw its
19 supplemental response would be prejudicial to Katz.

20 **V. Conclusion**

21 Aetna's objections to Special Master Quinn's Order No. 56 are wholly
22 unjustified. Therefore, Katz respectfully requests that Aetna's Objections be
23 overruled and the Court Order that DSMO No. 56 be adopted as the Order of this
24 Court regarding Katz's Motion to Compel Further Responses to Discovery
25 Requests.

1 Dated: June 2, 2008

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